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FILED
JUL 23 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 120

JONES MOTOR CO., INC., *Petitioner*

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent

and

HIGHWAY EXPRESS LINES, INC. and
MODERN TRANSFER COMPANY, INC.,
Intervening Respondents

PETITIONER'S REPLY TO RESPONDENT'S AND INTERVENING RESPONDENTS' BRIEFS IN OPPOSITION

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RESPONDENT'S AND INTERVENING RESPONDENTS' CONTENTIONS

Briefly stated, Respondent and Intervening Respondents assert that the Petition should be denied for five principal reasons. These are:

1. That there is no authority in Petitioner to tack or combine the interstate certificates upon which the interstate operation is predicated.

2. That the uncontradicted facts of record are that a subterfuge exists.

3. That the mode of operation of the interstate routes in question is not proper and does not establish a bona fide operation.

4. That other remedies are available at this stage.

5. That *Service Storage and Transfer Co., Inc. v. Commonwealth of Virginia*, 359 U. S. 171, does not mean what it says.

ARGUMENT IN REPLY

1. The Tacking of Petitioner's Interstate Routes Is Proper and in Accordance With the Applicable Law

That Petitioner, in fact, properly has combined its base certificate at MC 4963 and MC 4963, Sub 7 in accordance with the applicable law cannot be doubted. The Interstate Commerce Commission has decided this question in clear and unmistakable terms in *Transport Corporation of Virginia—Extension—Maryland*, 43 MCC 716, 719 in these words:

> "It is well settled that regular-route motor common carriers may operate over all combinations of their separately described routes and between all authorized points thereon, unless their service is specifically restricted in some particular. Powell Bros. Truck Lines, Inc.—Purchase—Bryan, supra. The same principle has been applied to regular-route common-carrier operations acquired by purchase, merger, or in proceedings under section 207(a) of the act. Days Transfer, Inc.—Purchase—Haner, 39 M.C.C. 339; Dixie Freight Lines, Inc., Common Carrier Application, 24 M.C.C. 780. And, it has been held generally in motor-carrier proceedings under sections 5 and 212(b) of the act that where common-carrier regular-route and

irregular-route authorities, or two or more common-carrier, irregular-route authorities are unified for operation by one carrier, through service may be provided between authorized points in both of such authorities, unless the public interest requires the imposition of a restrictive condition against the rendition of through service in whole or in part. The only requirement in these instances has been that there must be a point of service common to both operating authorities and the physical operation must be rendered through such common point. Carolina Freight Carriers Corp.—Purchase—Edmonds, 36 M.C.C. 259, B & E Transp. Co., Inc.—Purchase—Merchants Transp., Inc. 36 M.C.C. 561; and Consolidated Freightways, Inc.—Purchase—Pacific I. Exp., 38 M.C.C. 577."

See also *Aetna Freight Lines, Inc., Interpretation of Certificate*, 48 MCC 610; *Blewett—Purchase—Hester Truck Lines, Inc.*, 37 MCC 763; *Northern Transportation Co.—Purchase (Portion)—Mikulich*, 50 MCC 375; *Breeding Motor Freight Lines, Inc.—Purchase—Lee Way Motor Freight, Inc.*, 50 MCC 477.

The interpretation followed in the *Transport Corporation* case, *supra*, has also been followed by the Federal courts in *Century-Matthews Motor Freight* v. *Thrun*, 173 F. 2d 454 and *Interstate Common Carrier Council* v. *U. S.*, 84 F. Supp. 414, 420.

Moreover, in the instant matter the Interstate Commerce Commission specifically authorized combination of Petitioner's base certificate at MC 4963 with its certificate at MC 4963, Sub 7 in MC-F-4955, wherein the following language appears:

"Upon consummation of the purchase, Jones Motor Co., Inc., will be entitled to operate under

the operating rights granted at No. MC-108161, which rights are herein authorized to be unified with rights otherwise confirmed in it and to be embraced in a certificate in its name with duplications eliminated."

Despite Respondents' contention to the contrary, it is evident from this quotation that the "it" referred to can and does apply only to Jones Motor Co., Inc.; otherwise, the authorization is meaningless since Jones was the purchaser.

2. There Is No Evidence of Subterfuge in the Instant Record

Despite numerous statements by Respondent and Intervening Respondents indicating that the facts are uncontradicted that a subterfuge exists, it is significant to note that these Respondents initially presented no evidence but, upon conclusion of Petitioner's case, presented certain testimony by stipulation and additional testimony by incorporation into the record by reference.

The testimony received by stipulation was evidence of the mileage via Jones Motor Co., Inc.'s interstate routes and the driving time involved over those routes and evidence of mileage via a route lying wholly within Pennsylvania and the driving time involved over that route. The evidence incorporated by reference consisted solely of the operating authorities and tariffs of Intervening Respondents, the applications of Jones Motor Co., Inc. at A. 59731, Folder 8 and Folder 9, Am-A, the Order of Pennsylvania Public Utility Commission granting the authority sought and the opinion of the Pennsylvania Superior Court in *Modern Transfer Company* v. *Pennsylvania Public Utility Commis-*

sion, 179 Pa. Superior Ct. 46, 115 A. 2d 887 (1955) reversing the Commission.

None of this evidence does or can prove that a subterfuge existed. Respondent and Intervening Respondents allege that since Jones Motor Co., Inc. made application for an intrastate route between Allentown and Philadelphia, and since the authority granted was reversed by Pennsylvania Superior Court in the *Modern Transfer* case, *supra*, that this fact, standing alone, proves that the interstate operation was a subterfuge.

The fact of the matter is that the interstate operations have been conducted continuously since 1952 (R. 96a-97a) and the Pennsylvania Superior Court did not reverse the grant of the intrastate authority by Pennsylvania Public Utility Commission until 1955, some three years after the operation had been instituted under Interstate Commerce Commission authority and rates duly filed with the Interstate Commerce Commission.

Wherein is the subterfuge?

3. The Jones Interstate Operation Was Bona Fide and the Assertions Concerning It Are Not Supported by the Record

The uncontradicted facts of record in this proceeding reveal that operations over the interstate routes in question have been conducted continuously by Jones Motor Co., Inc. since 1952 (R. 96a-97a). The routes employed were checked with the Interstate Commerce Commission prior to the initiation of service (R. 164a; 208a; 91a). Such operations were conducted on a daily basis over the interstate routes in question and the same vehicles carried freight destined to points other

than those named in the Complaint for delivery in interstate commerce (R. 90a). Moreover, interstate interline traffic to and from other carriers also is handled by Jones Motor Co., Inc. in its operation under these same interstate routes (R. 90a). The routes in question are published as interstate routes in Middle Atlantic Tariff Conference Tariff No. 16, an interstate publication (R. 90a-91a).

Traffic handled, for example, from Philadelphia to points such as Phillipsburg, New Jersey and other points along the interstate routes is distributed from the Allentown terminal of Jones (R. 205a-206a).

The interstate routes initially operated through Clinton, New Jersey due to the location of a terminal at that point (R. 163a-164a; 208a). The Clinton, New Jersey terminal subsequently was closed because operations best could be conducted from the Jones terminal at Allentown, Pennsylvania from an economic standpoint (R. 176a). The routes continue to operate via Clinton, New Jersey (R. 96a-97a) and equipment is maintained at Philipsburg, New Jersey (R. 176a).

Drivers' logs, required by the Interstate Commerce Commission, are kept and the logs prove that the interstate routes are observed. Tach-o-graphs are used on the road vehicles and the mileages indicated thereon prove that the interstate routes are observed (Complainants' Exhibits C-1, C-2, C-3, C-4; Respondent's Exhibit 6).

In each of the movements averred in the Complaint interstate rates, duly published in interstate tariffs, were charged and collected (R. 82a; Respondent's Exhibit 5).

The combination of the routes is predicated, as aforementioned, on the specific authorization granted by the Interstate Commerce Commission in MC-F-4955, supra. Not only were the routes in question checked prior to the institution of service, but Respondent's Exhibit 4, erroneously excluded from evidence, establishes clearly that the responsible representatives of the Interstate Commerce Commission still are of the opinion that the transportation involved is interstate in nature.

4. The Instant Petition Is Properly Filed

Having instituted the Complaint, prosecuted it through its own attorneys, heard it before its own Examiners and decided it itself, Pennsylvania Public Utility Commission now feels that the instant Petition should be denied because Jones Motor Co., Inc. should have sought yet another authorization from the Interstate Commerce Commission.

What this contention in reality amounts to is that a Petition for Writ of Certiorari, duly filed and directed against the highest appellate courts of a State, should not be granted because there is some possibility that the petitioner would have access to the Interstate Commerce Commission. To adopt this reasoning would be to make it mandatory for a petitioner to appeal from the highest court in his State to the Interstate Commerce Commission as an intermediate step before an appeal or petition could be lodged with your Honorable Court.

A second alternative proposition is that this Petitioner should seek an injunction before a Federal court.

Throughout, Jones Motor Co., Inc. has raised the Federal question, has pursued its remedies before the Pennsylvania appellate courts and properly has filed its Petition for Writ of Certiorari from the opinion of the Superior Court of Pennsylvania by reason of the denial of allocatur by Pennsylvania Supreme Court, the only remaining Pennsylvania court which could have afforded a remedy.

The Petition is properly filed for the further reason that the Superior Court of Pennsylvania has decided a Federal question, contrary to an applicable decision of your Honorable Court, and further by reason of the fact that the denial of allocatur by the Supreme Court of Pennsylvania has resulted in the exhaustion of Petitioner's remedies before the Pennsylvania appellate courts, as previously mentioned in the Petition for Writ of Certiorari.

5. Service Storage and Transfer Co., Inc. v. Commonwealth of Virginia, Supra, Is the Applicable Decision, Which Has Been Ignored, and Means What It Says

In the course of the opinion by your Honorable Court in the *Service Storage* case, *supra,* it was indicated that proceedings such as the instant one should be brought by the appropriate State agency before the Interstate Commerce Commission pursuant to Section 204(c) of Part II of the Interstate Commerce Act. At page 6 your Honorable Court stated:

> "It appears clear that interpretation of Federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action."

Instead of proceeding before the Interstate Commerce Commission in the manner suggested by your Honorable Court in the *Service Storage* case, *supra*, the Respondent and Intervening Respondents would ignore the judgment of your Honorable Court and insist upon the right of the Pennsylvania Public Utility Commission, as Complainant, prosecutor and judge, to nullify the effect of rights granted by the Interstate Commerce Commission.

CONCLUSION

Pennsylvania Public Utility Commission does not contend here that it has decided a case which does not involve a Federal question. It appears to contend that it has the right to determine a Federal question and, having done so on its own motion, its decision is not reviewable by your Honorable Court despite the *Service Storage* case, *supra*.

Respondent was the original prosecutor and chose to be its own forum. Petitioner had a right to expect that Pennsylvania Public Utility Commission would recognize the validity of the Jones Interstate Commerce Commission authority. When the Pennsylvania Commission rendered its decision refusing to do so, Petitioner was obliged under Pennsylvania law to appeal to the Superior Court of Pennsylvania and, in turn, to the Supreme Court of Pennsylvania or it would have been confronted with the contention that it had not exhausted its remedies in Pennsylvania. Since neither the Pennsylvania Commission nor the Pennsylvania appellate courts have recognized the binding effect of the judgment of your Honorable Court in the *Service Storage* case, *supra*, the only remaining protection available to Petitioner is an argu-

ment on the merits before your Honorable Court upon issuance of the Writ prayed for.

Respectfully submitted,

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